impairment, physical damage or mutilation, or where the property is subject to an immediate, or nearly immediate, destruction, and does not authorize the sale of livestock though such stock is subject to deterioration in the course of time and will eventually perish.

The court said in part:

"This application is based upon the proposition that to keep the livestock throughout the winter would be unprofitable; that its present value, plus the cost of maintenance until spring, would be greater than its then probable value. If that be so, doubtless it would be good business policy to sell it, but the difficulty is that business expediency is not one of the grounds for an order to sell mentioned in section 980 of the Civil Practice Act (Laws 1920, c. 925). That section applies only to perishable property, and that liable to be injured by keeping. That livestock will ultimately deteriorate, and is in a sense perishable, is undoubtedly true. It is so with everything in this world—'All things pass away'—but it cannot be said, I think that the Legislature intended, because of this admitted fact, to give the court power to sell anything and everything. The section is to be construed in the light of the ordinary use and meaning of words. Thus 'injury' as it is used has reference to an impairment, a physical damage or mutilation, while 'perishable' must be held to intend what is subject to an immediate, or nearly immediate, entire destruction. The section was enacted as a provision against loss of property which by its nature, or unchangeable condition or situation is within a short time certain to either deteriorate or become a total loss."

"Moonshine" Not Subject of Larceny.—In People *v.* Spencer, 201 Pac. 130, the California District Court of Appeals, 3rd District, held that intoxicating liquor manufactured for beverage purposes subsequent to the time the 18th Amendment took effect, is not the subject of larceny, and that a person entering a building with the intent to take such liquor cannot be convicted of burglary.

The court said in part:

"The theory upon which the demurrer was sustained by the court below and upon which insistence upon an affirmance of the judgment is urged in this court is that the article which the information charges that the defendant entered the building with the intent to steal is not property or thing of value and consequently is not a subject of larceny. This theory is founded upon the provisions of the act of Congress, known as the Volstead Act (41 Stat. 305), which was enacted for the purpose of properly enforcing or of facilitating the proper enforcement throughout the United States of the provisions of the Eighteenth Amendment of the federal Constitution, prohibiting the manufacture, sale, transportation, possession, etc., of intoxicating liquors.

"Under the provisions of said act any liquors which contain one-half of 1 per centum or more of alcohol by volume to be used as bev-

erages, come within the ban of the statute. It will be noted that the information in this case alleges that the wine which the defendant is charged with having stolen contained more than one-half of 1 per cent. by volume of alcohol and that the same had been manufactured, for beverage purposes, since January 20, 1921.

"Section 8351b of said act, as the same has been codified (Barnes' Federal Code, 1921, Supplement), provides that—

'No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act. * * *'

"Section 8351t of the same act declares that any room, house, building, or other structure, where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, etc., is a common nuisance and annexes a penalty for the maintenance of such nuisance.

"Section 8352, among other things, provides:

'It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property right shall exist in any such liquor or property.'

"It is clear, from the foregoing provisions of the Volstead Act, that intoxicating liquors are not property within the meaning of the law. Civ. Code, sec. 654. Said section reads:

'The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property.'

"It is obvious that there cannot be under the law as it exists today in this country an ownership of intoxicating liquors manufactured for beverage purposes since the enactment of the Volstead Act, and manifestly, if there cannot be an ownership of such liquors, they cannot be in legal contemplation property. It necessarily follows that the charge of larceny cannot be predicated of the act of taking intoxicating liquors by one from the possession of another.

"It is true that the gist of the crime of burglary is the entering of a building with the intent to commit either grand or petit larceny or other felony, and, although no property may be taken by a person so entering a building or other felony committed therein, the crime is nevertheless consummated upon an entry of the building being effected with the intent to commit any of the crimes mentioned in the statute. The description or specific mention in this case of the particular property which the defendant entered the building with intent to steal is evidentiary, wholly surplusage, and unnecessary to incorporate into that pleading, and it seems to us that the district attorney has thus 'surplusaged' himself out of court in this case, for, having alleged in the information that the defendant entered the building with the intent to steal the particular property described therein, we are author-

ized to assume that he could only support the charge so preferred by evidence showing that the defendant did enter the building with the intent to steal the wine that was stored therein, and with no intent to steal any other property which might be in said building; in other words, we have a right to assume from the nature of the averments of the information that the district attorney thus purposely restricted himself to the right to prove the case by showing that the intent of the defendant in entering the building was only to take the wine, and this probably for the reason that the evidence available to him to establish the allegations of the information would and in fact could only show, if anything at all, that the defendant entered the building with the intent to take no other article therefrom than the wine which was stored or kept therein. This being so, the defendant could not be guilty of the crime of burglary, since, as we have above suggested, wine or other intoxicating liquors which come within the prohibition of the Eighteenth Amendment and the Volstead Act, not being property, cannot be the subject of larceny. Although a person, himself having no right to its possession, may intend to and in fact take intoxicating liquor from the possession of another, he cannot be proceeded against either criminally or civilly because of such intent or of the taking thereof.

"The soundness of the foregoing views would seem to be unquestionable; yet we are not without authority for their support. In People *v.* Caridis, 29 Cal. App. 166, 154 Pac. 1061, the defendant was charged by an information with the crime of grand larceny in that he had feloniously stolen and taken from another person a certain lottery ticket of a certain lottery company. A demurrer to the information was sustained upon the ground that the facts stated therein did not constitute a public offense, 'in the particular that it affirmatively appeared that the subject matter of the alleged larceny had no legitimate value,' and the action was thereupon dismissed. The people appealed, and in affirming the judgment the court said:

'The lottery ticket which was the subject matter of the larceny charged in the present case had no relative value save, as affirmatively alleged in the information, as the evidence of a debt due from an enterprise which was denounced by law and which apparently existed and was conducted by its promoters in defiance of the law. Pen. Code, sec. 319, et seq. It is a well-settled principle that an obligation which exists in defiance of a law which denounces it has, in the eye of the law, neither validity nor value.'

"In State *v.* Lymus, 26 Ohio St. 400, 20 Am. Rep. 772, the indictment charged the defendant with the crime of entering a building in the nighttime with intent to steal a dog kept therein, the property of the owner of the stable, of the value of $25. The trial court sustained a motion to quash the indictment, and upon appeal the Supreme Court said, in upholding the judgment, that under the laws of the state of

Ohio a dog was not property and therefore could not be the subject of larceny. The court further said:

'It will be time enough for the courts to say that a dog is the subject of larceny when the lawmaking power of the state has so declared. "Constructive crimes are odious and dangerous." ' Findlay *v.* Bean, 8 Serg. & Rowle (Pa.) 571.

"Parenthetically we may observe that in this state dogs, in derogation of the common-law rule, are declared to be personal property, 'and their value is to be ascertained in the same manner as the value of other property.' Pen. Code, sec. 491.

"There are other cases to the same effect as the above, but, as before stated, the proposition seems to be so clearly tenable that further citations are deemed unnecessary."

No Right of Action for Prenatal Injuries.—In Drobner *v.* Peters, 133 N. E. 567, the Court of Appeals of New York, held that an action by an infant for negligence resulting in prenatal injury is not sustainable under the principles of the common law, and without legislative sanction, and Penal Law, secs. 1050, 1052, as to injuries to a child quick in its mother's womb, secs. 80, 81, as to producing miscarriage of a child not quick, and Code Cr. Proc. secs. 500, 505, preventing execution of a female quick with child, do not change the common law rule.

The court said in part:

"Defendant negligently permitted a coalhole in the sidewalk in front of his premises to remain uncovered. Plaintiff's mother fell into it. Plaintiff, in his mother's womb, sustained injuries. Born 11 days after the accident, he now brings this action. It is contended that at the time of the injury he was not a person, but was a part of the body of his mother, and that, as the injury was to his mother, he has no cause of action.

"Mr. Justice Holmes said in 1884, in Dietrich *v.* Northampton, 138 Mass. 14, 52 Am. Rep. 242, that no case, so far as he knew, had ever decided that an infant could maintain an action for injuries received in the mother's womb. The great weight of authority is still against the plaintiff's contention that the unborn child has a right of immunity from personal harm (Allaire *v.* St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176; Walker *v.* Great Northern Ry. Co., 28 L. R. Ir. 69; Gorman *v.* Budlong, 23 R. I. 169, 49 Atl. 704, 55 L. R. A. 118, 91 Am. St. Rep. 629; Buel *v.* United Rys. Co., 248 Mo. 126, 154 S. W. 71, 45 L. R. A. (N. S.) 625, Ann. Cas. 1914C, 615; Lipps *v.* Milwaukee, etc., Co., 164 Wis. 272, 159 N. W. 916, L. R. A. 1917B, 334), although much judicial argument has been advanced to support a contrary ruling (Nugent *v.* Brooklyn Heights R. R. Co., 154 App. Div. 667, 139 N. Y. Supp. 367; dissenting